Nos. 22-CV-274 & 22-CV-301

DISTRICT OF COLUMBIA COURT OF APPEALS

FELICIA M. SONMEZ,

Appellant/Cross-Appellee,

v.

WP COMPANY LLC, *et al.*,

Appellees/Cross-Appellants.

Appeal/Cross-Appeal from Superior Court of the District of Columbia,
Civil Division—Civil Actions Branch
(Case No. 2021 CA 002497 B)
Judge Anthony C. Epstein

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UPDATED D.C. APP. R. 28(a)(2)(A) STATEMENT

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INTRODUCTION

Although Judge Epstein correctly dismissed Sonmez's claims applying the ordinary pleading standard, this Court can affirm the dismissal without even reaching the merits, through straightforward application of the D.C. Anti-SLAPP Act. The Post's argument rests on only three propositions, two of which are now largely conceded:

First, the Act protects more than just pure "speech"; it also extends to "expressive conduct" that implicates communicating with the public about issues of public interest. Sonmez and the ACLU both admit this point, thereby abandoning the sole reason that the Superior Court gave for denying The Post's special motion to dismiss.

Second, when a newspaper makes an editorial decision about *whose* content to publish, that is "expressive conduct" involving communication on matters of public interest, no less than a judgment about *which* content to publish. Sonmez and the ACLU resist that equation, but cannot reconcile their cramped account of expressive conduct with how the U.S. Supreme Court and other federal courts have construed that same concept in First Amendment cases, or with how the California Supreme Court has interpreted that state's similar anti-SLAPP statute. As a matter of both law and logic, editorial decisions about public expression are just as protected as the ultimate expression itself.

Third, when a plaintiff's claims arise, as here, from protected expressive activity, the Act requires her to adduce *evidence* to survive dismissal—and Sonmez admits she failed to carry that burden. While she tries to excuse that failure or to secure a do-over, both the Act's text and this Court's precedents foreclose those efforts.

Ultimately, Sonmez and the ACLU resort to arguing that her case is not a "classic" SLAPP. That is a legally irrelevant distraction, as this Court has already held. *Fells v. Serv. Emps. Int'l Union*, 281 A.3d 572, 581 (D.C. 2022). It is also wrong. Sonmez filed this case, not to obtain recompense for any genuine injuries, but rather to continue a crusade against The Post's editorial posture on #MeToo coverage. Her suit's goal is to "intimidat[e]" The Post into covering #MeToo the way she thinks it should be covered; and that effort to use litigation to gain advantage in a "public policy debate" is what the Anti-SLAPP Act is meant to prevent. *Id.* at 580-81. This Court should affirm and let this debate play out where it belongs—in newsrooms, not courtrooms.

ARGUMENT

I. DEFENDANTS MADE A *PRIMA FACIE* SHOWING THAT SONMEZ'S CLAIMS ARISE FROM EXPRESSIVE CONDUCT INVOLVING THE POST'S REPORTING.

Each of Sonmez's claims challenges the so-called "bans"—*i.e.*, The Post's decisions to assign *other* reporters, not her, to cover #MeToo-related stories. Those decisions are "expressive conduct" involving "communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1)(B). As the Complaint itself acknowledges, Defendants acted on concerns (well-founded or not) that Sonmez's advocacy painted her as an "activist" who had "taken a side" on #MeToo issues, creating the "appearance of a conflict of interest." *See* Defs. Opening & Resp. Br. ("Post Br.") 17-18, 23 (quoting JA23-24 ¶ 45, JA26 ¶ 52, JA33 ¶ 72). By admission, her claims thus arise from The Post's editorial judgments about *how and through whom* the paper should communicate with the public about this hot-button topic.

Courts have long recognized that such editorial decisions, including about whether to publish particular content, are "expressive conduct." *NetChoice, LLC v. Att'y Gen.*, 34 F.4th 1196, 1213-14 (11th Cir. 2022); *see also Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-58 & nn.22, 24 (1974); *Pulphus v. Ayers*, 249 F. Supp. 3d 238, 250 (D.D.C. 2017); Post Br. 15-16, 48-49. And courts have accorded anti-SLAPP protection to decisions, including personnel actions, that reflect those editorial judgments—like CNN's decision to fire a writer to protect the organization's "integrity and credibility," *Wilson v. Cable News Network, Inc.*, 444 P.3d 706, 721-23 (Cal. 2019), and CBS's personnel decisions about "who was to report the news," *Hunter v. CBS Broad., Inc.*, 165 Cal. Rptr. 3d 123, 131 (Ct. App. 2013); *see also* Post Br. 16-17. As underscored by a diverse set of amici ranging from the *Boston Globe* to *National Review*, those choices cannot be divorced from the expressive process of which they are part. *See* Media Amicus Br. 9-18.

Below, the Superior Court agreed the "bans" were "speech-related conduct" and "exercise[s] of editorial discretion" but nonetheless ruled they did not trigger the Anti-SLAPP Act because they were "not speech." JA171-73. That was its sole reason for denying the special motion to dismiss. Yet, as Sonmez and her amicus now admit, that was legally mistaken: The Act protects not only "speech" but also "expressive conduct." Sonmez Reply & Resp. Br. ("Sonmez Resp.") 8; ACLU Amicus Br. 9.

Rather than defending the decision below on its own terms, Sonmez puts forward various alternative reasons why The Post supposedly failed to carry its *prima facie* burden. None of her arguments (or those pressed by the ACLU) is convincing.

A. The "Bans" Were "Expressive Conduct."

Again, it is well-established in both the First Amendment and anti-SLAPP contexts that editorial judgments are "expressive conduct," and the Complaint admits the "bans" exercised such editorial judgment. Sonmez's counterarguments miss the mark.

1. Most broadly, Sonmez suggests that the bans could not be "expressive" because they were decisions *not* to publish her work and thus did not "communicate anything." Sonmez Resp. 12; *see also id.* at 1, 9. That is wrong on at least two levels.

For one, The Post *did* communicate with the public about #MeToo—just through reporters who had not "taken a side" on those sensitive issues. JA23-24 ¶ 45. Selecting those reporters was a critical part of how The Post communicated on this subject. That affirmative speech and the "bans" are just two sides of the same expressive coin.

For another, choosing *not to speak* is itself expressive. That is why newspapers have a "fundamental right to decide what to print *or omit*." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (emphasis added). It is why courts refuse to distinguish "speech" from "failure to speak" under anti-SLAPP statutes. *Kronemyer v. Internet Movie Database Inc.*, 150 Cal. App. 4th 941, 947 (2007). And it is why a host of cases have treated decisions not to speak or publish certain content as "expressive conduct." *NetChoice*, for example, held that social-media platforms engaged in "expressive conduct" when they chose *not* to publish posts by certain users or "deplatform[ed]" users altogether. 34 F.4th at 1206, 1213-14. These "ban[s]," the court emphasized, were "inherently expressive" because they determined based on each platform's "particular values and views" "whether and

to what extent it will publish information to its users." *Id.* at 1210, 1213-14, 1217. Sonmez—apparently unable to distinguish those "bans" from the ones here—ignores *NetChoice*. She also ignores most of the other cited cases that refute her position.[1]

2. Backpedaling, Sonmez concedes that *some* "decisions not to publish" may be "expressive conduct," but says that is only true as to "specific, objectionable content." Sonmez Resp. 10-11. This too is both factually and legally confused.

Factually, the "bans" here *were* directed to specific content—stories on "#MeToo-related topics." JA28 ¶ 56, JA31-32 ¶ 66. Indeed, by barring Sonmez from covering a narrow category of stories that raised particular editorial concerns while leaving her free to write on all other topics, The Post "specific[ally]" tailored the "bans" to the editorial problem at hand. Sonmez Resp. 10. It would have made no sense to consider her work story-by-story, or to edit it line-by-line, given the editorial judgment that the appearance of bias made Sonmez *an unsuitable author* for such articles across the board.

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[1] *See Wilson*, 444 P.3d at 723 (firing writer, and thus not publishing his work, is protected by anti-SLAPP statute); *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1558-59 (D.C. Cir. 1984) (not publishing reporter's column is protected by First Amendment); *Nelson v. McClatchy Newspapers, Inc.*, 936 P.2d 1123, 1133 (Wash. 1997) (not allowing employee to work as a reporter, and thus not publishing her work, is protected by First Amendment); *Rall v. Trib. 365, LLC*, 256 Cal. Rptr. 3d 775, 794-95 (Ct. App. 2019) (depublished) (not publishing blogger's work is protected by anti-SLAPP statute); *Greater L.A. Agency on Deafness, Inc. v. CNN, Inc.*, 742 F.3d 414, 423 (9th Cir. 2014) (not publishing videos with closed captioning is protected by anti-SLAPP statute); *Symmonds v. Mahoney*, 31 Cal. App. 5th 1096, 1105 (2019) (firing drummer, and thus not allowing him to play in band, is protected by anti-SLAPP statute); *Hyland v. Collins Ave. Ent., LLC*, No. BC536331, 2014 WL 10833779, at *5 (Cal. Super. Ct. Nov. 14, 2014) (suspending plaintiff, and thus not allowing her to help create TV show, is protected by anti-SLAPP statute). *See also* Media Amicus Br. 9-14.

Legally, Sonmez cites *Miami Herald*, but that decision undercuts her theory. Sonmez Resp. 10-11. That case broadly held that the First Amendment protects "[t]he choice of material to go into a newspaper," without any suggestion that a choice not to publish must be made in the context of a particular story, as opposed to by rejecting a reporter's writing on a particular topic. 418 U.S. at 258. To the contrary, the Court emphasized that these expressive protections extend to "*any*" decision not "to publish that which 'reason' tells [newspapers] should not be published." *Id.* at 256 (emphasis added). In *Miami Herald*, that meant the newspaper engaged in expressive conduct by refusing to publish politicians' replies to attacks. Here, it means The Post engaged in expressive conduct by refusing to publish Sonmez's reporting on #MeToo issues.

Nor can Sonmez derive support from *Hausch v. Donrey of Nevada, Inc.*, 833 F. Supp. 822 (D. Nev. 1993). "*Hausch* only stands for the proposition … that, *without an argument as to their specific relationship to the exercise of its editorial discretion*, a newspaper's personnel decisions with regard to editorial employees are not as a matter of course rendered free from regulation by the protections of the First Amendment." *McDermott v. Ampersand Publ'g L.L.C.*, No. 08-cv-1551, 2008 WL 8628728, at *12 n.8 (C.D. Cal. May 22, 2008) (emphasis added), *aff'd*, 593 F.3d 950 (9th Cir. 2010). The Post is not claiming that *every* personnel decision is expressive. And, as Sonmez admits, *Hausch* agreed that protected expression *does* occur when a newspaper decides not "to publish … material it does not wish to publish." Sonmez Resp. 11 (quoting *Hausch*, 833 F. Supp. at 830). That is what happened here, whether or not that judgment was "unfounded" (Sonmez Resp. 9).

3. Sonmez's next distinction is even stranger. She says the "bans" were not expressive because she was not a "top-level editor[]." Sonmez Resp. 11. Insofar as she is suggesting that only the choice of "top" editors is expressive conduct, that does not make any sense. A newspaper's "choice of writers" is also "bound to affect what gets published" and is thus also "expressive." *McDermott*, 593 F.3d at 962. Sonmez responds that the reporters in *McDermott* "explicitly sought editorial control," by trying to override the publisher's judgments about who and what to publish. Sonmez Resp. 12. But of course, she is trying to do exactly the same thing: The whole point of her lawsuit is to contest The Post's editorial choice not to assign her to #MeToo stories. That choice is the protected "expressive conduct" from which Sonmez's claims arise.

Sonmez also relies on *Wilson* for her "top-level editor" distinction (Sonmez Resp. 11-12), but badly misunderstands that decision. *Wilson* held that, for top editors with "ultimate authority" over an organization's speech, *any* personnel decision qualifies as protected expression under the anti-SLAPP statute. 444 P.3d at 721-22. As to "other employees in a newsroom," a personnel action is protected only if the employer makes a *prima facie* showing that it was based on "editorial" "considerations." *Id.* at 721-23. CNN made that showing in *Wilson*. *Id.* at 723. The Post made it here. *Supra* at 2-3.

4. Finally, Sonmez contends that a personnel decision can only be protected if it is based on an employee's "specific alleged violations of internal policies," as opposed to general "concerns" about "bias" or the "appearance of objectivity." Sonmez Resp. 9-10. Once again, Sonmez is both factually and legally off-base.

Factually, the Complaint itself makes a *prima facie* showing that Sonmez's advocacy violated a specific Post policy: "We don't have reporters who make statements on issues they are covering." JA23-24 ¶ 45. Sonmez was also warned of The Post's policy against "criticizing other news organizations," yet she attacked the *L.A. Times* and reporters for *Reason* and *The Atlantic*. *See* JA20 ¶ 35, JA31 ¶¶ 63-65, JA32-33 ¶¶ 70-72.

Legally, moreover, Sonmez's distinction has nothing to do with whether a decision is expressive. As the California Supreme Court explained, what matters for anti-SLAPP protection is whether the defendant acted based on "editorial" "considerations," such as "journalistic ethics" or preserving the newspaper's "credibility." *Wilson*, 444 P.3d at 723. Action taken for those reasons is expressive and implicates anti-SLAPP objectives, whether or not the editorial considerations are embodied in written policies.

Sonmez's sole authority for the notion that editorial decisions are expressive only if based on "specific" policy violations is *Associated Press v. NLRB*, 301 U.S. 103 (1937). That decision says nothing of the sort. It held that the First Amendment did not protect a newspaper's decision to fire an employee based on his "union activity." *Id.* at 132-33. The newspaper did "not claim" the employee "had shown bias" or "will be likely … to show bias in the future," and so no question was presented about its power to enforce "impartiality." *Id.* at 131-32; *see also Nelson*, 936 P.2d at 1132 (recognizing that *Associated Press* "was not commenting on whether [a newspaper] could discharge the editor if or when his continued activity led [it] to believe its appearance of impartiality was subverted"); *McDermott*, 593 F.3d at 959 (similar).

If anything, *Associated Press* favors The Post. It reiterated that the First Amendment safeguards a newspaper's "full freedom and liberty … to publish the news as it desires." 301 U.S. at 133; *see also McDermott*, 593 F.3d at 959 (citing *Associated Press* as "signal[ing]" protection for "the press's freedom and liberty 'to publish the news as it desires'"); *Passaic Daily News*, 736 F.2d at 1557 (same). That readily encompasses The Post's decision not to publish Sonmez's #MeToo reporting, confirming that the conduct challenged here was "expressive conduct" protected by the Anti-SLAPP Act.

B. The "Bans" Involved "Communicating Views to Members of the Public in Connection with an Issue of Public Interest."

The "bans" also "involve[d] … communicating views to members of the public in connection with an issue of public interest," D.C. Code § 16-5501(1)(B), because they determined how The Post reported to the public about the #MeToo movement.

1. Sonmez and the ACLU contend that the "bans" were not protected because they were merely "behind-the-scenes" decisions that did not themselves communicate with the public. Sonmez Resp. 12; ACLU Amicus Br. 11-14. Wrong again.

To start, the Act sweeps more broadly than Sonmez's argument gives credit. It does not limit its protection to expressive conduct *that itself communicates* with the public; rather, it protects any expressive conduct that "*involves*" communicating with the public. D.C. Code § 16-5501(1)(B) (emphasis added). As the Supreme Court has observed, "the word 'involving' is broad and is indeed the functional equivalent of 'affecting.'" *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995). Here, the expressive

conduct *involved* public communication because it dictated—and surely *affected*—how The Post would report to the public about the #MeToo movement. Unlike reading in one's private yard, The Post's exercise of editorial judgment hardly had "nothing to do with communicating views to members of the public." ACLU Amicus Br. 8.

This Court's decision in *Fridman v. Orbis Business Intelligence Ltd.*, 229 A.3d 494 (D.C. 2020), refutes Sonmez's narrow reading. *Fridman* held that even a defendant's "private" communications with media outlets were protected, because it "expected and intended that the media in turn would communicate … to the public." *Id.* at 503. In other words, *private* communications were the first step toward *public* ones, and thus "involved" the latter. So too here, The Post "expected and intended" its assignment decisions to shape The Post's public reporting on #MeToo, *id.*, rendering those decisions protected.

Beyond all that, Sonmez and the ACLU also wrongly minimize the communicative function of the "bans" themselves. For one thing, silence is itself a form of protected communication. *See supra* at 4-5 & n.1. For another, the "bans" conveyed to the public, if only through bylines, that other reporters—not Sonmez—were covering #MeToo on The Post's behalf, and the Act can protect even purely factual communications. *See Fells*, 281 A.3d at 581; *Fridman*, 229 A.3d at 503-04. For a third, Sonmez ignores that editorial judgments in the speech-creation "process" cannot be divorced from the "final speech product." Media Amicus Br. 10-14. Of course, not *every* step is "expressive." *See* ACLU Amicus Br. 13-14 (giving example of buying a printing press). But the "bans" were expressive editorial acts that "involved" The Post's ultimate reporting.

One of the ACLU's hypotheticals well illustrates the error in its restrictive reading. It says that if a newspaper were sued for refusing to print opposition research about a political candidate, that suit could proceed in the normal course, because the newspaper "engaged in no communication of any kind." ACLU Amicus Br. 19. That cannot be right. If the Trump Campaign had sued a newspaper for failing to report on the Hunter Biden laptop story, that would be a classic SLAPP deserving of the Act's scrutiny: The newspaper made an expressive editorial decision (*not* to publish a story) that involved communication with the public (its political reporting) on an issue of public interest (the alleged scandal). The Court should thus reject the artificially stilted interpretation of the Act that Sonmez and the ACLU advance.

2. Sonmez also denies that The Post's decisions involved communication "about" or "on" "issues of public interest." Sonmez Resp. 13. That last-ditch challenge ignores key statutory language and this Court's clear precedent.

The Act is not limited to conduct involving communication "about," "directly concerning," or "explicitly refer[ring] to" issues of public interest. *Saudi Am. Pub. Rels. Affs. Comm. v. Inst. for Gulf Affs.*, 242 A.3d 602, 611 (D.C. 2020). Rather, the relevant communication need only be "in connection with" issues of public interest, D.C. Code § 16-5501(1)(B), which is a "very broad" relational phrase, *In re Smith*, 138 A.3d 1181, 1185-86 (D.C. 2016), that creates significant "play in the joints" of the Act and "should be generously construed." *Saudi Am. Pub. Rels. Affs. Comm.*, 242 A.3d at 611-12. Yet Sonmez ignores that language altogether.

The "bans" plainly had a "connection" or "relation" to an issue of public interest, namely, the #MeToo movement, as they conveyed who would author The Post's stories on the movement and how The Post covered it. And Sonmez herself characterizes the #MeToo movement as "one of the most important social movements of our time." Opp. to Consol. Mot. to Dismiss ("Opp.") 18 (Nov. 5, 2021). The movement thus "relate[s] to" "health," "safety," and "community well-being," D.C. Code § 16-5501(1)(B), (3), and so unmistakably qualifies as an issue of public interest. *See Fells*, 281 A.3d at 581-82 (holding statement protected because it "relate[d] to" the "#MeToo movement"); *see also Saudi Am. Pub. Rels. Affs. Comm.*, 242 A.3d at 611 ("relate[s] to" is "expansive[]" and shows that "issues of public interest should be liberally interpreted").

3. Ultimately, Sonmez's arguments on this element reduce to a claim that The Post was not engaged in a "public policy debate" when it assigned Sonmez to other stories. Sonmez Resp. 12. Like her other arguments, that is both wrong and irrelevant.

It is wrong because The Post's decisions were indeed part of a "public policy debate" about the #MeToo movement and how the media should responsibly cover it. *See supra* at 2. Regardless, the Act "extend[s] beyond lawsuits meant to silence one side of a public policy debate." *Fells*, 281 A.3d at 581. The Council made "a deliberate choice that the statute sweep broadly" beyond quintessentially "classic" SLAPPs, and so the only relevant question is whether the Act's "broad[]" and "plain terms" apply. *Id.* For all of the reasons above, the answer to that question is clearly "yes."

C. The Commercial Interest Exception Is Inapplicable.

In her last argument directed to The Post's *prima facie* case, Sonmez tries to invoke the Act's commercial interest exception, which excludes protection for "statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance." D.C. Code § 16-5501(3). According to Sonmez, The Post's assignment decisions were not protected because The Post "prioritized its own commercial interests" by catering to its "perception" that readers prefer "objectivity." Sonmez Resp. 14.

At the outset, Sonmez forfeited this argument. She bore the burden to establish that the "commercial interest" exception applies, *see Doe No. 1 v. Burke*, 91 A.3d 1031, 1043 (D.C. 2014), yet her brief below did not even mention it, and the Superior Court therefore did not address whether the "bans" triggered it. *See* Opp. 42-46. Sonmez may not "inject" a new argument into the case "at this juncture." *Strass v. Kaiser Found. Health Plan of Mid-Atl.*, 744 A.2d 1000, 1009-10 (D.C. 2000); *see also Vector Realty Grp., Inc. v. 711 Fourteenth St., Inc.*, 659 A.2d 230, 233 (D.C. 1994) (refusing to consider appellee's new argument based on "presumptive rule that this court will not consider questions raised for the first time on appeal").

Even if the commercial-interest exception were properly before this Court, this Court has already rejected Sonmez's theory. She claims that The Post assigned others to #MeToo stories for "financial gain," aiming to "boost[] its own business image and prestige" by publishing "objectiv[e]" and "prize[]"-winning journalism. Sonmez Resp.

14-15. But that motive-based interpretation of the exception would leave all for-profit entities—including reporters and other media outlets—without the Anti-SLAPP Act's protections. That is not the law. Rather, this Court has explained that a "speaker's self-interested motivations *say little* about whether the content of their speech is related to issues of public interest." *Fells*, 281 A.3d at 583 (emphasis added). Public voices are often "quite handsomely paid for expressing their views, and are no doubt at least partially motivated by that remuneration," but "[t]hat does not change the fact that the content of their commentary relates to issues of public interest." *Id.*

Here too, The Post's alleged motive of "financial gain" does not trigger the commercial-interest exception. What matters, instead, is that the assignment decisions involved The Post's #MeToo-related reporting, which was speech "directed primarily" to "matter[s] of public significance." D.C. Code § 16-5501(3); *see also Fells*, 281 A.3d at 583 (asking whether "the content" of the speech "relates to issues of public interest"). Courts addressing "the Post's reporting" on other topics have had little trouble agreeing that it is directed to matters of public significance, such that the "commercial interest[]" exception does not apply. *Lawless v. Mulder*, No. 2021 SC3 000441, 2021 WL 4854260, at *4 (D.C. Super. Ct. Oct. 5, 2021). That holds equally true in this case.

D. The ACLU's Other Arguments Are Red Herrings.

As amicus, the ACLU makes a few additional arguments that, while academically interesting, have no bearing on the proper resolution of this case and should not distract from the straightforward arguments presented above.

First, the ACLU explains that the Anti-SLAPP Act is broader in some respects and narrower in other respects than the First Amendment. *See* ACLU Amicus Br. 2-7. That may be correct. But it is neither here nor there. At this point, everyone agrees the Act covers "expressive conduct." Defendants have cited First Amendment caselaw, but only to illustrate that courts treat editorial judgments as "expressive conduct." Whether or not a particular editorial judgment is constitutionally protected, there is no reason why such a judgment would qualify as "expressive conduct" for First Amendment purposes but not for Anti-SLAPP Act purposes. The *concept* is the same.

Second, the ACLU argues that the D.C. Act was not "modeled" on California's anti-SLAPP statute. *See* ACLU Amicus Br. 14-17. Again, that may be correct as a historical matter, but it does not affect the outcome here. Whether modeled or not, this Court has identified California's statute as "similarly worded," *Am. Studies Ass'n v. Bronner*, 259 A.3d 728, 742, 746-48 & n.87 (D.C. 2021), and looked to California's well-developed SLAPP caselaw for guidance, *see Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1236 nn.30-31 (D.C. 2016). So when California courts interpret "similar" anti-SLAPP rules, their decisions properly "buttress[]" this Court's. *Bronner*, 259 A.3d at 742, 746. And the provisions here do not differ in discernibly meaningful ways. Notwithstanding the amicus' hairsplitting (ACLU Amicus Br. 15-17), there is little daylight—at least on these facts—between *conduct that furthers free speech in connection with issues of public interest* (Cal. Civ. Proc. Code § 425.16(e)(4)), and *expressive conduct that involves public communication in connection with issues of public interest* (D.C. Code § 16-5501(1)(B)). *See* Post Br. 20.

Finally, the ACLU engages in a back-and-forth with the media amici about a series of hypotheticals. The ACLU says some would be SLAPPs, others would not, and for still others the answer would depend on the facts. *See* ACLU Amicus Br. 17-22. All that matters here, however, is that *this case* falls within the Act's definitions: The "bans" were editorial judgments ("expressive conduct") that affected ("involve[d]") The Post's reporting ("communicating views to members of the public") about the #MeToo movement ("an issue of public interest"). The Act therefore applies.

II. SONMEZ ADMITS SHE FAILED TO PROFFER *ANY* EVIDENCE FOR HER CLAIMS.

Under the Anti-SLAPP Act's heightened standard, Sonmez was required to present "evidence" that her claims were "'likely to succeed on the merits.'" *Mann*, 150 A.3d at 1233, 1238 n.32 (quoting D.C. Code § 16-5502(b)); *see also Fells*, 281 A.3d at 585; *Bronner*, 259 A.3d at 740-41 & n.38. But Sonmez admits she did not. Sonmez Resp. 15. Thus, as Sonmez further conceded and the court agreed below, her claims must be dismissed if The Post carried its *prima facie* burden. Post Br. 14. Sonmez's belated efforts to avoid that result are both forfeited, *Strass*, 744 A.2d at 1009-10, and also meritless.

First, Sonmez argues that she could satisfy her evidentiary burden using The Post's "version of events." Sonmez Resp. 16. That is doubly wrong. For starters, the Act and this Court's precedents are "clear": Sonmez bears the burden of presenting legally sufficient evidence, *Fells*, 281 A.3d at 585 n.7; courts are "not at liberty to dispense with this statutory burden" or to shift it to The Post, which faces no "evidentiary demand." *Mann*, 150 A.3d at 1237-38 & n.32, 1252 n.53; *see also Bronner*, 259 A.3d at 741 n.38.

Anyway, The Post never submitted a "version of events." It filed a *motion to dismiss* and so "assumed" the truth of the Complaint's allegations "for purposes of th[e] motion only." Mem. ISO Consol. Mot. to Dismiss & Special Mot. to Dismiss ("Mem.") 3 (Sept. 24, 2021). Consistent with this Court's precedent, The Post's motion showed that the "alleg[ations]" made out a *prima facie* case but did not thereby "concede," adduce, or otherwise stipulate to any facts, *Saudi Am. Pub. Rels. Affs. Comm.*, 242 A.3d at 612 n.12. Sonmez's analogy to summary judgment (Sonmez Resp. 16) is thus inapposite: Her allegations are not uncontested facts, but "mere pleadings" that cannot serve as the "evidence" necessary to defeat either summary judgment, *Grimes v. District of Columbia*, 794 F.3d 83, 94 (D.C. Cir. 2015), or dismissal under the Anti-SLAPP Act.

Second, Sonmez insists she *could have* submitted evidence, such as a "sworn affidavit" or documents substantiating her allegations. Sonmez Resp. 18. Perhaps. But she did not. And courts may not "dispense with" the Anti-SLAPP Act's requirements. *Saudi Am. Pub. Rels. Affs. Comm.*, 242 A.3d at 608-10. The law clearly required Sonmez to present supporting "evidence," rather than mere "allegations," *Mann*, 150 A.3d at 1233, but even after The Post invoked that requirement below, *see* Mem. 28-30, Sonmez still admittedly provided nothing, *see* Sonmez Resp. 15; JA171. As such, "the Act requires" the court "to dismiss the complaint," *Mann*, 150 A.3d at 1232, 1235—period.

Finally, Sonmez asks for another chance to submit evidence on remand. Sonmez Resp. 17-18. But Sonmez is not entitled to a "second bite at the apple" given that she already had a "full and fair opportunity to present whatever facts [she] chose." *Evans v.*

United States, 122 A.3d 876, 885 (D.C. 2015); *see also Green v. United States*, 231 A.3d 398, 412 n.44 (D.C. 2020). Particularly in this context, a do-over would be inappropriate: The whole point of the Anti-SLAPP Act is to compel plaintiffs to present evidence "*early* in the litigation" for "*expeditious*[] and *economical*[]" screening. *Mann*, 150 A.3d at 1235, 1238 (emphasis added). This Court has accordingly refused to allow plaintiffs to rely on "evidence submitted to the trial court after its ruling on the special motion to dismiss." *Nicdao v. Two Rivers Pub. Charter Sch., Inc.*, 275 A.3d 1287, 1294 n.8 (D.C. 2022). Sonmez's request to submit evidence even later—after the ruling below, full appellate proceedings, and the remand she envisions—fails *a fortiori*.

In any event, Sonmez is mistaken in presuming there will be a remand. She thinks one "will be required anyway for her claims that are unaffected by the special motion." Sonmez Resp. 17. That is wrong: The Act compels dismissal of the entire case, *see* Part III, *infra*, and any claims that could somehow escape would fail for a multitude of other reasons, *see* Post Br. 21-50. Regardless, Sonmez's bid to submit evidence more than 18 months after The Post filed its special motion to dismiss should be rejected.

III. THE ENTIRE COMPLAINT IS SUBJECT TO THE ACT AND DISMISSAL.

Seeking to salvage a sliver or two of her case, Sonmez asserts for the first time that The Post's special motion is only a "partial motion," because the Anti-SLAPP Act at most defeats her challenge to the "bans" but not her challenges to the "performance review, security denial, suspension, and online harassment." Sonmez Resp. 6, 17, 38. This too is mistaken. The Act requires dismissal of her entire Complaint.

As this Court has explained, the Act applies on a "claim-by-claim basis," *Bronner*, 259 A.3d at 734, 743, and defines "[c]laim" to include each "cause of action," D.C. Code § 16-5501(2). Here, the Complaint asserts four "causes of action," or "counts," under the DCHRA. *See Bronner*, 259 A.3d at 749 (equating "claims," "counts," and "cause[s] of action"); *Taylor v. D.C. Water & Sewer Auth.*, 957 A.2d 45, 47, 49-50 (D.C. 2008) (same). Crucially, each such cause of action expressly rests at least in part on the "bans" (the protected activity). JA48-53 ¶ 115 (Count I), ¶ 123 (Count II), ¶ 132 (Count III), ¶ 140 (Count IV). As a result, each claim "arises from" protected activity, D.C. Code § 16-5502(b), and is therefore subject to the Act, *Bronner*, 259 A.3d at 747, 749.

Contrary to Sonmez's premise, a claim triggers the Act's heightened standard even if it does not arise *exclusively* from protected activity. It is enough that "such activity is an *element* of the challenged cause of action." *Id.* at 749 (emphasis added). If protected activity serves as an element of the claim—which the "bans" do by allegedly contributing to the adverse action or hostile work environment that underlies each of Sonmez's DCHRA claims—the heightened standard applies. *See id.* at 749-50.

In other words, the Complaint's counts cannot be carved up into an array of new "claims"—some challenging just the "bans" (triggering the Act) and others challenging other actions (which do not). This follows directly from *Bronner*, which took twelve claims as alleged in the "twelve-count complaint" and analyzed whether each triggered the Act's heightened standard by being "based on protected activity." *Id.* at 737, 749. Sonmez's claims do just that, so the Act applies to all of them without exception.

This should not come as any surprise to Sonmez. The Post argued below that the Anti-SLAPP Act compels dismissal of the entire Complaint, Mem. 28-30, and reiterated at the hearing that the Act is "case dispositive," JA93-94. At no point did Sonmez argue that individual counts should be spliced apart for the Anti-SLAPP Act analysis; to the contrary, she has always insisted that the "bans" and the other challenged actions are *intertwined* and cannot be evaluated in isolation. *See* Sonmez Resp. 6 n.3, 20; Sonmez Opening Br. 29-30. This Court should not now indulge her new, inconsistent, last-ditch attempt to avoid complete dismissal. *See Strass*, 744 A.2d at 1009-10.

CONCLUSION

The Court should affirm the judgment below.

Dated: March 31, 2023

Respectfully submitted,

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REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Jacqueline M. Holmes
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22-CV-274 & 22-CV-301
Case Number(s)

March 31, 2023
Date

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2023, I filed the foregoing Reply Brief with the Clerk of Court via the Appellate E-Filing System, causing the filing to be served on counsel for Appellant/Cross-Appellee. In addition, I caused an electronic courtesy copy to be served on counsel for Appellant/Cross-Appellee via email.

Dated: March 31, 2023

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